ORDER NO. 79696

IN THE MATTER OF THE INVESTIGATION INTO RECURRING RATES FOR UNBUNDLED NETWORK ELEMENTS PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996.	*	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND
(Petitions for Reconsideration/Rehearing of Order No. 78552 and Order No. 78852)	*	
	*	CASE NO. 8879

On February 8, 1996, the Telecommunications Act of 1996 ("the Act")[1], enacted by the Congress of the United States, became law and initiated local competition at the national level. At that time, the Public Service Commission ("Commission") found itself in good position to oversee the development of such competition, having begun a similar, if more limited path over a year earlier. The Commission, embracing its obligations under the Act, quickly began licensing competitive local exchange carriers ("CLECs") and within five months had docketed its first arbitration proceeding.

Shortly thereafter, on August 8, 1996, the Federal Communications Commission ("FCC"), providing much needed rules and regulations pertaining to implementation of the Act, released its initial *Local Competition Order*[2] which became effective on September 30, 1996. On October 15, 1996, the United States Court of Appeals for the

[1] The Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§ 151 *et. seq*.

Eighth Circuit stayed portions of the FCC's *Local Competition Order* pertaining to the FCC's pricing provisions for unbundled network elements and the "pick and choose" rule. Thus began a massive surge of litigation over the FCC's interpretation of the Act, and a period of regulatory ambiguity that has spanned the last eight years, and continues today.

On November 8, 1996, the Commission instituted Case No. 8731, Phase II to consider and establish permanent unbundling rates. On May 1, 1998, the Commission docketed Case No. 8786 to consider rates for non-recurring unbundled network elements ("UNEs"). On July 2, 1998, the Commission issued Order No. 74365 in Case No. 8731, Phase II, by which it set permanent recurring UNE rates. Petitions for rehearing of Order No. 74365 were filed by Verizon Maryland Inc. ("Verizon"), AT&T Communications of Maryland, Inc. ("AT&T"), and WorldCom, Inc. ("MCI").

On January 19, 2001, the Commission noted that,

> In the time ensuing since the Commission first docketed Case No. 8731 and its various subsets, the telecommunications industry has been constantly in flux and evolution. Not only has the Commission's docket become unwieldy with over 800 entries, but judicial and Federal Communications Commission orders interpreting the Act . . . have had the effect of changing the landscape of regulation in the telecommunications industry. Additionally, the passage of time and extraordinary technological advances has had the effect of making the rates and cost studies presented for the Commission's consideration in 1996 outdated. *(Order No. 76694 at 2-3)*.

[2] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*; CC Docket No. 96-98; CC Docket No. 95-185, 11 FCC Rcd. 15499; FCC 96-235; rel August 8, 1996.

The Commission subsequently determined, based on the foregoing, that Case No. 8731 should be closed, and denied the requests for rehearing and reconsideration pending as of that time in that docket. The Commission simultaneously docketed a new proceeding, Case No. 8879, to re-examine recurring UNE rates in Maryland. Thereafter, several parties to Case No. 8786, the then pending non-recurring rates proceeding, requested that the docket be closed and the scope of Case No. 8879 be enlarged to consider non-recurring UNE rates, as well as several new unbundled network elements proposed by Verizon on September 29, 2000. The Commission granted the request and consolidated both UNE rate proceedings on February 26, 2001.

On June 30, 2003, in the midst of continued federal-level regulatory flux and telecommunications industry evolution the Commission issued Order No. 78552 establishing permanent UNE rates. On July 30, 2003, the Commission received Petitions for Reconsideration/Rehearing of Order No. 78552 from Verizon, AT&T, and MCI. Additionally, on September 12, 2003, Cavalier Telephone Mid-Atlantic, LLC ("Cavalier") filed a Motion for Stay of Non-Recurring Rates. Various parties filed replies to the Petitions for Reconsideration and Cavalier's Motion for Stay on October 22, 2003.[3]

On December 19, 2003, the Commission issued Order No. 78852 in which it granted the Petitions for Reconsideration/Rehearing filed in this matter by Verizon, AT&T and MCI, and granted rehearing on an additional issue pertaining to the appropriate geographic deaveraging formula for use in allocating costs among the four

[3] Cavalier filed its reply jointly with its Motion for Stay on September 9, 2003.

rate zones. The Commission also granted Cavalier's Motion for Stay of the Non-Recurring rates established pursuant to Commission Order No. 78552, and established an interim 2-wire hot cut rate of $35, which will be subject to a true-up upon the issuance of a final order in this case. On January 14, 2004, Verizon filed a Petition for Reconsideration of Order No. 78852. On March 24, 2004, AT&T filed a response thereto.

In making the decision to grant the reconsideration/rehearing requests, the Commission recognized that since the issuance of Order No. 78552 there had been considerable activity at the federal level by the FCC. Particularly, on August 21, 2003, the FCC issued its *Triennial Review Order*[4] and afterward on August 29, 2003, the FCC's Wireline Competition Bureau released its *Virginia Arbitration Price Order.*[5] Additionally, on September 15, 2003, the FCC issued a *Notice of Proposed Rulemaking*[6] beginning a review of its UNE pricing rules in which it made several tentative conclusions that potentially could affect the decisions made by the Commission in Order No. 78552.

[4] In the Matters of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advances Telecommunications Capability, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, and 98-147, FCC 03-36, rel. Aug. 21, 2003. ("*Triennial Review Order*").

[5] In the Matter of Petitions of WorldCom, Inc. and AT&T Communications of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, *Memorandum Opinion and Order*, CC Docket Nos. 00-218 and 00-251, DA-03-2738. "*Virginia Arbitration Price Order*".

[6] In the Matter of Review of the Commission's Rules Regarding the pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers, *Notice of Proposed Rulemaking*; WC Docket No. 03-173; FCC 03-224; rel. September 15, 2003.

Since then, on March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit issued an Opinion that vacated and/or remanded various portions of the *Triennial Review Order.*[7] And most recently, on December 15, 2004, the FCC issued a News Release in which it announced the adoption of new unbundling rules and, conceptually, a new world for wireline competition where the regulatory focus has switched from UNE-Platform to UNE-Loop.

As an initial matter, the Commission recognizes that the issue pertaining to the appropriate alignment of rates among rate zones was not addressed in the existing record of Case No. 8879, and as such, a record will need to be created. With respect to the remaining issues raised on reconsideration, the Commission, as indicated in Order No. 78852, has been engaged in the process of reconsidering these issues based upon the existing stale record and in light of the telecommunications regulatory landscape and marketplace changes that have occurred in the last couple of years. While the Commission believes that some of the issues raised by the parties may legitimately require further consideration, the Commission finds itself hampered by a stale record. The Commission notes that much of the data referenced in Case No. 8879 is at least three years old, and based upon incumbent local exchange carrier obligations that have been superceded by recent FCC rulings. Furthermore, the Commission is constrained by the inherent difficulty in using both sponsored recurring cost models. The record in this proceeding has been overrun by circumstances and the never-ending litigation of these matters at the federal level.

[7] *United States Telecom Association v. FCC*, 356 F.3d 554 (D.C. Cir. 2004).

The Commission is now faced with making a decision of how to proceed in a way that balances the needs of the parties to this proceeding, the public, and the Commission. While the Commission could proceed with its reconsideration of the issues on the existing records, the Commission does not believe this would benefit the public or the parties and would not be an efficient use of its time and resources, especially given the FCC's December 15th News Release. The Commission is aware that in light of the elimination of UNE-P and the phase-out of mass market switching, it will need to develop a record and approve a batch hot cut process and associated rates, all within a relatively short period of time. However, while the Commission has already stayed the effectiveness of the non-recurring rates established by Order No. 78552, the Commission is mindful that the carriers have been operating under recurring rates that may also be based upon inappropriate inputs and an inappropriate model. After considering this matter, and in recognition of the above-noted factors, the Commission believes a more prudent course of action, rather than resolving the issues on reconsideration, would be to stay the remainder of the rates adopted in Case No. 8879, and immediately docket new proceedings to develop the necessary hot cut and batch hot cut processes and rates, as well as subsequent proceedings to re-examine the loop rates, and the remaining non-recurring and recurring UNEs that will continue to be available consistent with the FCC's anticipated order.

In granting a stay of the recurring Case No. 8879 UNE rates, the Commission notes that Verizon previously advocated such action in response to Cavalier's Motion to Stay Non-recurring Rates, and that the Commission initially rejected Verizon's argument.

Verizon again raised this argument in its January 14th Petition for Reconsideration of Order No. 78852. AT&T opposes any reconsideration of the Commission's initial rejection. Ordinarily the Commission might agree with AT&T; however, the Commission has engaged in sufficient deliberations on the issues raised on reconsideration to believe that some of the recurring rates are questionable, at best, due to the use of improper inputs and improper models. For this reason, the Commission reconsiders its initial rejection of Verizon's arguments for a stay of the recurring rates established by Order No. 78552. Upon that reconsideration, the Commission hereby stays the recurring rates established in Order No. 78552, and adopts an interim UNE rate regime with an eye towards avoiding disruption in the marketplace while the Commission considers appropriate permanent rates.[8]

To that end, the Commission finds that the interim State-wide average loop rate adopted in the Section 271[9] proceeding, Case No. 8921, would best serve as a proxy for developing the prospective interim rates, as this rate was accepted by Verizon and the FCC during its consideration of Verizon's Section 271 application. However, the Commission, having already expressed its concern over the appropriateness of the geographic deaveraging produced by Verizon's models in Case No. 8879, is equally concerned about the unsupported geographic deaveraging formula used by Verizon in its Case No. 8921 compliance filings to arrive at the specific rate levels for each of Maryland's rate zones, which according to Verizon were chosen to arrive at the

[8] By this Order the Commission does not disturb its prior directives contained in Order No. 78852 as they pertain to non-recurring rate elements, except with respect to the prospective inapplicability of the true-up mechanism.
[9] 47 U.S.C. 271.

Commission's adopted State-wide average rate. Given the lack of clarity regarding this issue, the Commission concludes that the geographic deaveraging formula used by Verizon in Case No. 8879, which had been reviewed and accepted by the Commission previously in Case No. 8731, should be used pending a fresh look at this issue in the upcoming proceeding.

The Commission notes that the State-wide average loop rate it specifically approved in Case No. 8921 of $12 is approximately 6.57 percent higher than the State-wide average loop rate established in Case No. 8879 of $11.26. The Commission finds that the best method of ensuring the continued use of the current geographic deaveraging formula would be to apply a 6.57 percent increase across the board to all recurring rates set in Case No. 8879. The resulting rates shall be the effective interim rates until such time as they are superceded by permanent rates. Verizon is directed to perform the calculation for each recurring element priced in Case No. 8879 by increasing the rate by 6.57 percent. Verizon is further directed to make a compliance filing with the Commission containing the interim recurring rates established herein, and the interim non-recurring rates established in Order No. 78852. As Verizon has withdrawn its statement of generally available terms and conditions, the Commission recognizes that a schedule of such rates is no longer on file with the Commission. Therefore, the Commission directs that Verizon develop and file a UNE tariff containing rates for all UNEs whose prices were initially established in Case No. 8879.

As a final matter, the Commission recognizes that in Case No. 8921 it provided for a true-up mechanism between the Section 271 approved loop and switching rates and

the final Case No. 8879 rates. Additionally, in the initial order on reconsideration issued in this docket, Order No. 78852, the Commission also provided for a true-up mechanism with respect to the interim $35 hot-cut rate, and furthermore directed Verizon to postpone the loop and switching rate true-up process pending issuance of a Commission Order resolving the petitions for reconsideration/rehearing. Based upon the changes wrought by the FCC, the Commission now finds itself taking an interim approach to UNE rate making that it could not have reasonably foreseen earlier. Because of the amount of time that will undoubtedly pass before permanent UNE rates are established, the Commission hereby directs that the obligation of a true-up process contemplated in Case No. 8921 and Order No. 78852 be limited in time and scope to affect only those rates paid from the dates of those earlier directives through the effective date of this Order. As such, upon the establishment of final loop, switching and hot cut rates, Verizon will implement a true-up process for loops and switching covering the period from December 17, 2002 until the date of this Order, and a true-up process for hot-cuts covering the period from December 19, 2003 until the date of this Order.

In docketing the new proceedings referenced herein, the Commission is mindful of the direction taken by the FCC in the announcement of its new permanent rules. The Commission anticipates that the elimination of the UNE-P twelve months from the effective date of the FCC's order will necessitate migration of a large number of UNE-P lines to CLEC facilities. Therefore, the Commission intends to initially, and expeditiously, review the existing hot cut process, develop a batch hot cut process, and establish appropriate rates. Thereafter, the Commission will undertake a second

proceeding to establish permanent loop rates and possibly a third proceeding for those other UNEs that will continue beyond the FCC's permanent rules order.

IT IS, THEREFORE this 29th day of December, in the year Two-Thousand and Four,

ORDERED: 1) That for the reasons indicated herein, the recurring rates resulting from Order No. 78552 issued on June 30, 2003, in Case No. 8879 are hereby stayed;

2) That Verizon shall compute the interim recurring rates as directed herein, and the rates shall become effective on January 1, 2005, and shall remain effective until such time as directed by the Commission;

3) That Verizon shall file a UNE tariff with the Commission containing both recurring and non-recurring interim rates calculated in conformance with the terms of this Order and Order No. 78852, within 30 days of the date of this Order; and

4) That the Commission shall issue a subsequent Notice of Procedural Schedule docketing an expedited proceeding to develop a hot cut process and a batch cut process and rates.

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Commissioners